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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

LEONARD CASEY AND HAROLD DEAN SUTTLE,
Petitioners

v.

STATE OF TENNESSEE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

WILLIAM B. VEST
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Dated: May 14, 1987

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48 pp

QUESTIONS PRESENTED

1. Whether or not the Tennessee Supreme Court has misinterpreted, in this Tennessee review of first impression of a Federal wire intercept ordered 1981, the **United States v. Giordano** case, 416 U.S. 505 (1974), the **United States v. Chavez** case, 416 U.S. 562 (1974) and subsequent decisions of various Federal Courts of Appeals, by holding that other than the Attorney General or a specially designated Assistant Attorney General can authorize an application for interception order pursuant to 18 U.S.C. § 2516(1). The opinion is apparently based on the Court's conclusion that the specially designated Assistant Attorney General does not have to execute a written authorization or otherwise affirmatively demonstrate authorization was in fact

given when the purported authorization is properly challenged.

2. Whether or not a trial court's denial of a motion to suppress, in a Title III case, should be upheld by the Tennessee Supreme Court regarding the issuing Federal Court's compliance with the mandatory requirements of § 2518(1)(3) (Judicial requirements) when it is obvious the appellate courts have ignored or erroneously interpreted facts presented to the lower court as clearly contained in the transcript and exhibits presented to the appellate courts.

OTHER PARTIES NOT LISTED IN CAPTION

SHIRLEY RAY BASHAM,

Co-defendant, whose telephone was subject of intercept order, conviction reversed by Tennessee Court of Criminal Appeals on other grounds, pending State of Tennessee Application for Permission to Appeal to Tennessee Supreme Court.

ALEXANDER TAFT,

U.S. Attorney, Western District of Kentucky, who obtained the order for intercept.

ALICE BASHAM,

wife of Shirley Ray Basham, whose telephone was also subject to intercept order.

DENNIS JOE STOBAUGH,

Co-defendant, conviction upheld, status unknown.

BILLY HARGRAVES,

Co-defendant, acquitted at trial.

FEDERAL BUREAU OF INVESTIGATION,

Agency authorized to implement interception order.

JUDGE THOMAS BALLENTINE,

U.S. District Court, Western District of Kentucky at Bowling Green, issued intercept order.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED----------i

TABLE OF CONTENTS----------iv

TABLE OF AUTHORITIES----------viii

OPINIONS BELOW----------1

JURISDICTION----------2

CONSTITUTIONAL PROVISIONS INVOLVED-----3

STATUTORY PROVISIONS INVOLVED----------3

STATEMENT OF THE CASE----------9

REASONS FOR GRANTING THE WRIT---------18

A. The decision of the Tennessee Court of Criminal Appeals, affirmed by the Tennessee Supreme Court, in a case of first impression, upholding Petitioners' convictions below conflicts with the prior rulings of this Court and numerous other Federal Courts of Appeals, so that it is now unclear, at least in Tennessee State Courts, whether or not an individual in the U.S. Dept. of Justice other than the Attorney General or a

Page

specially designated Assistant Attorney General, pursuant to 18 U.S.C. 2516(1), (1981), can authorize an application for intercept order pursuant to 18 U.S.C. § 2516(1). To allow the decision of the Tennessee Supreme Court to stand regarding criminal prosecutions solely emanating from evidence gathered pursuant to 18 U.S.C. § 2501, et.seq., will allow the interception of wire or oral communication in a manner contrary to the requirements of 18 U.S.C. § 2516, for which strict construction is mandated, and would subvert the congressional intent underlying Title III of the Omnibus Crime Control and Safe Streets Act.----------19

B. That the Tennessee Supreme Court and Tennessee Court of Criminal Appeals erroneously interpreted the evidence presented to it demonstrating the issuing Federal Judge did not and could not have read the Application for Intercept Order and thus did not and could not have complied with the necessity

Page

requirement and the three-step probable cause requirement of 18 U.S.C. § 2518(1), the determination of proper authority requirement of 18 U.S.C. 2518(1)(a) or to have drawn the conclusions necessary for the issuance of the Intercept Order pursuant to 2518(3)(a)(b)(c)(d). To allow this decision involving a Federally issued wiretap for which there has been no Federal judicial review to stand will only erode the intended protection of Title III to the citizens of Tennessee. ----------27

CONCLUSION----------35

CERTIFICATE OF SERVICE----------37

TABLE OF AUTHORITIES

Page

United States v. Bowdach,
501 F.2d 220 (5th Cir. 1974)----23

United States v. Calallero,
503 F.2d 1018, (6th Cir. 1974)---25

United States v. Chavez,
416 U.S. 562(1974)-------i,23,24,29

United States v. Cihal,
336 F.Supp.261, (D.C.
W.D. Pa. 1972)--------------------25

United States v. Fox,
349 F.Supp. 1258,(D.C.Ill. 1972)
affirmed 500 F.2d 1404----------23

United States v. Giordano,
416 U.S. 505 (1974)---------i,24,29

United States v. King,
478 F.2d 494 (9th Cir.1973)---25,35

United States v. Laff,
365 F.Supp. 737,(D.C. S.D.
Fla. 1973)-----------------------25

United States v. Santarpio,
560 F.2ds 448 (1st
Cir. 1977)(Cert.Denied) 98
S.Ct. 609,434 U.S.984 54
L.Ed.2d 478----------------------30

United States v. Ventresca,
380 U.S.102,85 S.Ct.
741, 13 L.Ed.2d 684 (1965)-------30

Page

United States v. Vogt,
CA 760 F.2d 206(8th Cir.1985)----22

United States v. Wac,
498 F.2d 1227,(6th Cir.1974)-----25

STATUTES AND OTHER AUTHORITIES

18 **United States Code Annotated,**
§ 2516--i,3,17,18,19,20,22,24,27,35

18 **United States Code Annotated, § 2518**
---ii,4,16,17,19,20,27,28,29,32,33,34,35

18 **United States Code Annotated,**
§ 1257----------3

United States Constitution, Fourth
Amendment----------3,35

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. _____

LEONARD CASEY AND HAROLD DEAN SUTTLE

Petitioners

v.

STATE OF TENNESSEE

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

Petitioners Leonard Ray Casey and Harold Dean Suttle respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Tennesse Supreme Court in the above entitled case.

OPINIONS BELOW

The opinion of the Tennessee Court of Appeals, affirmed by the Tennessee Su-

preme Court by its denial of petitioners' Application For Permission To Appeal, has not yet been reported. However, it is reprinted in the Appendix hereto at pp. 1a-45a. The Order of the Tennessee Supreme Court is reprinted in the Appendix hereto at pp. 46a. The order of the Criminal Court of Sumner County, Tennessee, denying petitioners' motion to suppress evidence gained by way of wire intercept is reprinted in the Appendix hereto at pp. 47a-49a.

JURISDICTION

The opinion of the Tennessee Court of Appeals was rendered November 13, 1986. Thereafter, a timely application for permission to appeal was denied on March 16, 1987. This petition for certiorari was filed within 60 days of the entry of the order denying the applica-

tion for permission to appeal. This Court's jurisdiction is invoked under 18 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 2516: Authorization for interception of wire or oral communications. (1981)

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or

approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having reponsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of --

§ 2518. Procedure for interception of wire or oral communications. (1981)

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place

where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral com-

munications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that --

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communica-

tions concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify --

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(10)(a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;
(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review the judgment of the Tennessee Court of Appeals, Middle Section at Nashville, affirmed without opinion by the Tennessee Supreme Court, which upheld the convictions of Petitioner Casey for third degree burglary with a firearm (2 Counts) and attempt to commit a felony and Petitioner Suttle for third degree burglary with a firearm (2 Counts). To facilitate an understanding of the important issues implicated in this case, Petitioners provide the following facts and judicial procedure below to the consideration of the questions presented:

A. On August 14, 1981, Judge Thomas Ballentine, U.S. District Court for the Western District of Kentucky at Bowling Green, Case No. 81-814-01-L, issued

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATION authorizing the Federal Bureau of Investigation to intercept telephone calls to and from numbers 502-781-1091, subscribed to by Shirley Ray Basham, Bowling Green, Kentucky, and to and from 502-781-5637, subscribed to by Alice Basham, Bowling Green, Kentucky. (App. 50a-59a.)

B. The Order had been requested by Application of Alexander Taft, U.S. Attorney, Western District of Kentucky, dated August 14, 1981, which was supported by the 67 page Affidavit of Robert H. Brewer, Special Agent, Federal Bureau of Investigation, dated August 14, 1981 (App. 60a-63a)/[1].

/[1] Since only the length of the Brewer Affidavit is at issue and not the specific content, for brevity's sake, only the first and last pages are presented.

C. The Application was further supported by Attorney General Benjamin R. Civiletti's Order No. 921-81 authorizing the Assistant Attorney General in charge of the Criminal Division, U.S. Dept. of Justice to authorize Application for Court Orders for Wire Intercept (App. 64a-67a); an unsigned and uninitialed Authorization for Interception Order Application from D. Lowell Jensen, Assistant Attorney General, Criminal Division, dated August 13, 1981 (App. 68a-70a); and an unsigned or uninitialed letter from D. Lowell Jensen to U.S. Attorney Taft dated August 14, 1981, regarding intercept authorization (App. 71a-73a).

D. On October 16, 1981, the Sumner County Tennessee Grand Jury returned an indictment charging Petitioner Casey and Petitioner Suttle and co-defendants

Dennis Joe Stobaugh and Billy Hargraves with two counts of third degree burglary with a firearm; Petitioner Casey with larceny of auto and two counts of attempt to commit a felony; and co-defendant Shirley Ray Basham with accessory before the fact of third degree burglary with a firearm.

E. November 9, 1982, co-defendant Basham filed a Motion to Suppress all evidence derived from or being fruits of the wire intercept, to which all co-defendants were allowed to join by the Trial Court. Relevant portions of the Motion to Suppress are included in the Appendix (App. 74a-76a). This motion included as grounds, among others, that:

1. The Intercept Order was facially void;

2. The Application for Intercept Order was not properly authorized.

F. The joint Motion to Suppress was denied, after hearing, without comment or opinion by the Trial Court on October 16, 1984 (App. 47a-49a).

G. On January 16, 1985, Petitioner Casey, Petitioner Suttle and co-defendant Stobaugh were found guilty of third degree burglary with a firearm (2 Counts); Petitioner Casey was also found guilty of attempt to commit a felony; co-defendant Shirley Ray Basham was found guilty of accessory before the fact of third degree burglary without a firearm; and co-defendant Billy Hargraves was acquitted.

H. On June 3, 1985, Petitioners' Motion for New Trial, including issues

now before this Honorable Court, were denied.

I. On November 13, 1986, the Tennessee Court of Criminal Appeals, Middle Section at Nashville, affirmed the conviction of Petitioners Casey and Suttle and Stobaugh. In so doing, the Court, regarding issues before this Court, held in its Opinion (App. 1a-45a) that proper authorization for the wire intercept application had been obtained, the issuing judge read the application and had probable cause to issue the intercept order. The Court reversed Basham's conviction for lack of evidence.

J. On March 16, 1987, the Tennessee Supreme Court denied the Casey, Suttle and Stobaugh Application for Permission to Appeal and granted the State's Tennessee Application for Permission to Appeal as to Basham (App. 1a-45a).

K. The appeal to the Tennessee Supreme Court as to Basham, is pending as of this writing.

L. Although the Federal Bureau of Investigation utilized a Federally issued wiretap, no federal arrests or indictments were made as a result of the wiretap and no Federal judicial review of the wiretap has occurred.

M. Although Attorney General Civiletti authorized the Assistant Attorney General (Jensen) in charge of the Criminal Division to then authorize the Intercept Order Application (App. 64a-67a), no specially designated Assistant Attorney General actually authorized the application for intercept order in this case. Instead, the application was obstensibly authorized by Philip Wilens, Director, Officer of Enforcement Opera-

tions, Criminal Division (App. 71a-73a). Even though the purported authorization was challenged in the trial courts and on appeal, neither Assistant Attorney General Jensen, Criminal Division, the Government or the State has yet to make any affirmation, or other offer of proof, that Jensen indeed authorized the Application for Intercept Order.

N. Issuing Judge Thomas Ballentine did not read the supporting documents accompanying the Application for Intercept Order (App. 77a-82a).

O. All evidence presented at trial emanated from or was the fruit of the August 14, 1981 Intercept Order.

Petitioners contend they are entitled to application of the exclusionary rule provided in 18 U.S.C. § 2518(10)(a) for the failure of the Government and ju-

diciary to comply with the provisions of 18 U.S.C. §§ 2516 and 2518 in obtaining the Intercept Order from which the evidence utilized to convict defendants was gained.

REASONS FOR GRANTING THE WRIT

A. The decision of the Tennessee Court of Criminal Appeals, affirmed by the Tennessee Supreme Court, in a case of first impression, upholding Petitioners' convictions below conflicts with the prior rulings of this Court and numerous Federal Courts of Appeals, so that it is now unclear, at least in Tennessee state courts, whether or not an individual in the U.S. Department of Justice other than the Attorney General or a specially designated Assistant Attorney General, pursuant to 18 U.S.C. § 2516(1), (1981), can authorize an application for intercept order. To allow the decision of the Tennessee Supreme Court to stand regarding criminal

> **prosecutions solely emanating from evidence gathered pursuant to 18 U.S.C. §§ 2516 and 2518, will allow the interception of wire or oral communications in a manner contrary to the requirements of 18 U.S.C. §§ 2516 and 2518, for which strict construction is mandated, and would subvert the congressional intent underlying Title III of the Omnibus Crime Control and Safe Streets Act.**

The questions presented by this writ are of such exceptional importance, transcending the particular factual situation and the parties below, that the entire intent of Congress in enacting the requirements of 18 U.S.C. §§ 2516 and 2518, permitting wire and oral communications interception, and the holdings of

this Court and our Federal Courts of Appeals, has been abrogated by the Trial and Appellate Courts of the State of Tennessee. This is especially true considering the factual basis upon which the Tennessee Court of Criminal Appeals, affirmed by the Tennessee Supreme Court, has approved the admission of wiretap evidence in state criminal cases. Admission of evidence gained from wiretap, ostensibly authorized pursuant to 18 U.S.C. §§ 2516 and 2518, is an issue of first impression in Tennessee, although regularly litigated in other states and Federal courts. To allow this holding to become law and to be interpreted to mean that oral authorization of intercept orders without subsequent affirmation, on challenge, and/or that other than the Attorney General or a specially designated

Assistant Attorney General can properly authorize an application for intercept order, will effectively eliminate adherence to the strictly construed requirements of the mandatory provisions of Title III including the utilization of the exclusionary rule provision therein in the courts of the State of Tennessee. In this era of increased utilization of evidence derived from Federal wire/oral interception in state criminal prosecutions, Tennessee must come into compliance with the law already properly enforced in other state and Federal courts.

The facts of this case show there was no proper authorization for the application for specific intercept order by either the Attorney General or a specially designated Assistant Attorney Gen-

eral but instead that the Application for Intercept Order was authorized by the Director, Office of Enforcement Operations, Criminal Division, U.S. Department of Justice. Even in the face of challenge to the unsigned, uninitialed purported authorization by the specially designated Assistant Attorney General, Criminal Division, the United States Government, through the State of Tennessee prosecutor, has yet to produce any evidence, by affirmation or otherwise, that the purported authorization was indeed authorized by the specially designated Assistant Attorney General as mandated by 18 U.S.C. § 2516(1). This fact scenario does not envision application of the authority of **U.S. v. Vogt**, CA 760 F2d 206 (8th Cir. 1985), which sanctioned telephonic authorization from a specially designated

Assistant Attorney General not accomplished by contemporaneous writing; of **U.S. v. Fox**, 349 F.Supp. 1258, (D.C. Ill. 1972), affirmed 500 F.2d 1404, which sanctioned written authorization affirmed by utilization of the specially designated authorizing individual's initials in the memorandum of authorization; of **United States v. Bowdach**, 501 F.2d 220 (5th Cir. 1974) where the Attorney General personally authorized the request for application; of the **Chavez** case /[1], where there was proof of the actual authorization; or ministerial acts of no consequence once the specially designated Assistant Attorney General has actually made his authorization.

/[1] **United States v. Chavez**, 416 U.S. 562 (1974).

This case, to date, has allowed routine processing of the Application for Intercept Order by a Department of Justice subordinate rather than one of the highest named law enforcement officials in the U.S. Government, as named in 18 U.S.C. § 2516(1), who is expected to exercise personal judgment before approving any application. This has not occurred and the Tennessee holdings subvert the strict compliance requirements of 18 U.S.C. § 2516(1) intended by Congress, enforced by the courts, and is in direct conflict with the **Giordano case** /[1] **and the Chavez** case /[2]. Further, the facts presented are most similar to the facts constituting lack of authority for

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/[1] **United States v. Giordano**, 416 U.S. 505 (1974)

/[2] **United States v. Chavez**, 416 U.S. 562 (1974)

intercept order applications in **United States v. King**, 478 F.2d 494 (9th Cir. 1973); **United States v. Wac**, 498 F.2d 1227, (6th Cir. 1974); **United States v. Calallero, 503 F.2d 1018, (6th Cir. 1974); United States v. Laff**, 365 F. Supp. 737, (D.C. S.D. Fla. 1973); and **United States v. Cihal**, 336 F.Supp. 261, (D.C. W.D. Pa. 1972) Cert. Denied, among others, for which suppression was ordered and upheld.

Petitioners understand authorization orders are presumed proper and, in their attempt to overcome such presumption, have risen above mere conjecture or speculation and specifically raised the issue of lack of proper authorization at the earliest opportunity and have factually challenged that the specially designated Assistant Attorney General did not in fact authorize the application. In so

doing, Petitioners carried their burden in making specific challenge to the purported authorization. In the face of this evidentiary challenge, the Courts below have erroneously held that written authorization and/or later affirmation of the actual authorization, if any, is not required and, by implication, that one other than a specially designated Assistant Attorney General can properly authorize an application for intercept order even when the reviewing court is presented with demonstrable challenge to the authorization.

Tennessee is in conflict with the myriad of federal holdings that continually reiterate there must be a showing that the Attorney General, or a specially designated Assistant Attorney General, actually authorized the application for the specific intercept order in question.

This alone is sufficient to require this writ of certiorari be granted in order to bring Tennessee into compliance with existing law and to insure proper application of 18 U.S.C. § 2516(1) to wiretap cases prosecuted in the state courts of Tennessee.

B. That the Tennessee Supreme Court and Tennessee Court of Criminal Appeals erroneously interpreted the evidence presented to it demonstrating the issuing Federal Judge did not and could not have read the Application for Intercept Order and thus did not and could not have complied with the necessity requirement, the three-step probable cause requirement of 18 U.S.C. § 2518(1), and/or the determination of proper authority

> requirement of 18 U.S.C. 2518(1)(a) or to have drawn the conclusions necessary for the issuance of the Intercept Order pursuant to 2518(3)(a)(b)(c)(d). To allow this decision involving a Federally issued wiretap for which there has been no Federal judicial review to stand will only erode the intended protection of Title III to the citizens of Tennessee.

The United States Supreme Court has never explicitly held that a United States District Judge or Magistrate must read the application for intercept order and accompanying affidavit submitted prior to the court executing an order directing implementation of the intercept. However, the United States Supreme Court,

through the **Giordano** case/[1] and **Chavez** case/[2], has upheld the requirements of 18 U.S.C. § 2518 (Judge's duties) as mandatory and that the issuing judge must specifically determine the requirements of 18 U.S.C. § 2518(3) are met, i.e., that probable cause exists for the issuance of the intercept order, that the intercept order is necessary, and that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. Petitioners submit it is impossible to conceive that the issuing judge can properly make these mandatory findings without reading the application

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/[1] **United States v. Giordano**, 416 U.S. 505 (1974)
/[2] **United States v. Chavez**, 416 U.S. 562 (1974)

and supporting affidavit and any other supporting documents.

The decision in **United States v. Ventresca**, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), search warrant case, does hold thát the warrants submitted to the courts for issuance must be read prior to issuance. This standard for judicial review was then applied to applications for intercept orders in **United States v. Santarpio**, 560 F.2d 448 (1st Cir. 1977)(Cert. Denied) 98 S.Ct. 609, 434 U.S. 984 54 L.Ed.2d 478.

It is suggested there is no authority whatsoever allowing an intercept order to stand when the evidence discloses the issuing judge did not read the application for order and supporting affidavit so that the judge could comply with the statutory requirements that the court

make certain findings on which the order of intercept is based. Petitioners submit the supporting affidavit must be read in order for the court to conclude the allegations in the application, and the court's ultimate findings in the order, are true.

During the original hearing on all Defendants' Motion to Suppress, the issue of whether or not the issuing judge actually read the Application for Intercept Order and accompanying 67 page F.B.I. Affidavit and purported authorization documents was first raised because of the glaring lack of a signature or initials on the Memorandum of Authorization under the name of the Assistant Attorney General, Criminal Division, the lack of a supporting affidavit regarding actual authorization and the lack of identifica-

tion in the Order for Interception of the person actually authorizing the application as mandated by 18 U.S.C. § 2518(4)(d). Petitioners, understanding intercept orders are to be presumed proper, absent challenge, then timely raised the issue and presented evidence, through the United States Attorney, who processed the application in the United States District Court, that the issuing judge had not read the supporting 67 page affidavit. U.S. Attorney Taft testified he wasn't sure the issuing judge actually read the supporting affidavit, that he did "review" it and that Affiant, Agent Brewer, gave the Court a "summary" of the contents of the affidavit.

The issuing judge's lack of appropriate review on which to base the mandatory findings required by 18 U.S.C. §

2518(4) is corroborated by the fact that the actual Intercept Order itself makes no reference to the identity of the person who obstensibly authorized the application. This is mandatory pursuant to 18 U.S.C. § 2518(4)(d). Petitioners submit that had the trial judge actually read the documents presented to him by U.S. Attorney Taft that he would have rejected the Application and refused to execute the Intercept Order, prepared by U.S. Attorney Taft (App. 80a) because it did not facially comply with § 2518(4)(d); i.e., the name of the person authorizing the application was not divulged in the order. The courts below found the issuing judge had read the application but ignored the question of whether the court had read the supporting affidavit as a predicate to making its

findings of probable cause, necessity and failure of other investigative techniques which were contained in the Court Order. These findings cannot be made by a court, even with its broad discretion regarding issuance of intercept orders, when the court has not read the documents and affidavit and other documents supporting the Application for Intercept Order. Again, in the face of specific challenge, the prosecution failed to provide any competent evidence that the issuing Court had complied with the requirements of 18 U.S.C. § 2518(3)(4). The failure to comply with the judicial determination requirements of 18 U.S.C. § 2518(3)(a)(b)-(c)(d) and the Order content requirement of 18 U.S.C. § 2518(4)(d) alone should mandate the granting of this Petition for

Writ of Certiorari. **United States v. King**/[1].

CONCLUSION

The opinion below is totally inconsistent with holdings of the U.S. Supreme Court and the Federal Courts of Appeals. The opinion invites gross abuse in Tennessee of the protection afforded by 18 U.S.C. § 2516, 18 U.S.C. § 2518 and the Fourth Amendment to the United States Constitution. The contrary decision below, taken in light of decisions in the U.S. Supreme Court and Federal Courts of Appeals, which have required enforcement and strict construction of Title III, injects such a different meaning as to eliminate the mandatory requirements and protection to the citizenry of Title

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/[1] **United States v. King**, 478 F.2d 494 (9th Cir.1973

III in the trial courts of Tennessee which entertain or receive evidence gathered from oral or wire interceptions. A writ of certiorari should issue to correct the judgment below, suppress the evidence gained from the unlawful intercept and to apply the mandatory requirements of Title III to the state courts of Tennessee.

Respectfully submitted,

WILLIAM B. VEST
635 E. Main St.
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(615)824-5108
Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that I have served copies of this Petition for Writ of Certiorari on Michael J. Cody, Attorney General, and Charles E. Bush, Assistant Attorney General, 450 James Robertson Parkway, Nashville, TN 37019, by depositing copies of same in a mail box with first class postage prepared this 14th day of May, 1987.

I further certify that all parties required to be served have been served.

WILLIAM B. VEST

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86 2005

Supreme Court, U.S.
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Dated: May 14, 1987

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85 pp

TABLE OF CONTENTS

Page

Opinion of the Tennessee Court of Criminal Appeals dated November 13, 1986----------1a

Order issued by the Tennessee Supreme Court denying Applications for Permission to Appeal Convictions of Dennis Joe Stobaugh, Leonard Ray Casey and Harold Dean Suttle dated March 16, 1987-----46a

Order issued by the Criminal Court for Sumner County, Tennessee, overruling Motion to Suppress Wiretap Evidence dated October 16, 1984----------47a

Order issued by the United States for the Western District of Kentucky, authorizing interception of wire communication dated August 14, 1981----------50a

Affidavit of Robert H. Brewer, Federal Bureau of Investigation, dated August 14, 1981, (As noted in Petition, only Pages 1 and 67 are included for brevity sake)----------60a

Designation Order issued by Attorney General Civiletti, dated January 19, 1981----------64a

TABLE OF CONTENTS (CONT'D)

Page

Authorization for Interception Order Application issued by Assistant Attorney General D. Lowell Jensen dated August 13, 1981----------68a

Letter to U.S. Attorney Alexander Taft from D. Lowell Jensen by Philip Wilens dated August 14, 1981----------71a

Motion to Suppress wiretap evidence dated November 9, 1982----------74a

Testimony of U.S. Attorney Taft dated December 6, 1982----------77a

No. 85-188-III
IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

JUNE 1986

STATE OF TENNESSEE,
Appellee

v. SUMNER CRIMINAL

SHIRLEY RAY BASHAM,
LEONARD RAY CASEY,
DENNIS JOE STOBAUGH and
HAROLD DEAN SUTTLE,
Appellants

AFFIRMED AS TO CASEY, STOBAUGH AND SUTTLE

REVERSED AND DISMISSED AS TO BASHAM

FILED: NOVEMBER 13, 1986

Before: WALKER, BYERS and SCOTT, Court of Criminal Appeals Judges

WALKER, Criminal Judge, delivered the opinion of the Court, in which BYERS, and SCOTT, Criminal Judges, joined.

OPINION

The defendants (Shirley Ray Basham, Leonard Ray Casey, Dennis Joe Stobaugh, and Harold Dean Suttle), were convicted in the Sumner County Criminal Court for their roles in a night of burglaries in Gallatin on September 3, 1981. The jury found Shirley Ray Basham guilty of accessory before the fact of third degree burglary without a firearm and fixed his punishment at not less than six years nor more than ten years in the penitentiary. The trial judge fixed this consecutive to a previous Kentucky sentence. Leonard Ray Casey was convicted of two counts of third degree burglary with a firearm and received two concurrent sentences of not less than ten years nor more than 12 years in the penitentiary. He was also convicted of attempt to com-

mit a felony, grand larceny of a Chevrolet van, for which he received a sentence of 11 months and 29 days in the Sumner County Jail and a fine of $1000. Casey's burglary sentences are consecutive to this attempt sentence.

The defendant, Dennis Joe Stobaugh, was also convicted of two counts of third degree burglary with a firearm and received concurrent sentences of not less than ten years nor more than 12 years in the penitentiary. Harold Dean Suttle was also convicted of two counts of third degree burglary with a firearm but received concurrent sentences of not less than ten years nor more than ten years in the penitenitary.

A fifth defendant, Billy Hargraves, was found not guilty of two charges of burglary in the third degree.

We find that Basham's conviction must be reversed, but that there is no reversible error as to Casey, Stobaugh and Suttle.

On August 14, 1981, the Federal Bureau of Investigation was given permission by the Federal District Court for the Western District of Kentucky to wiretap two of Shirley Basham's telephones. In a tape of a telephone conversation of September 2, 1981, at 1:28 p.m., Basham stated that he and the other boys had been down to look at something in Tennessee. Basham felt that it was a big operation and "a hell of a big deal." There were about four or five buildings, including several warehouses. Basham agreed with Joe Stobaugh that it would probably be "a hell of a big carry." Basham ran out all the roads down there

but did not want to drive back through because people were looking at him. Later, at 1:45 p.m., Basham told Leonard Casey over the telephone that he had just told "one of the fools up north" that they found the place down there. The northerner could arrange to come down the next day.

At 4:34 that afternoon, Basham assured Dean Suttle's wife that Dean was working with boys that would make the count right and not shortchange each other. Those boys would be straight with Dean even if it was 50 grand in a sack.

On the next day, September 3, Basham asked Dean Suttle if his boy had heard from the Louisville boys. He urged Suttle that they should not go without a certain person because he was the main cog in the wheel on one thing and he had

"all the stuff" that worked. At 6:02 p.m., Basham asked Casey if he had heard from "these geese." Casey replied that they were going to try to make it if "he gets hold of the other one." Casey asked Basham: "You didn't get caught, did you?" Basham responded: "Right." Casey said he was just waiting on them and Basham asked him what time they were supposed to holler. Casey replied: "Anytime between now and 8:00."

The F.B.I., with the help of other agencies, also conducted other forms of surveillance on Shirley Basham and the other defendants in the Bowling Green, Kentucky, area. An Alcohol, Tobacco and Firearms Bureau agent observed Leonard Casey load some packages and a box into his Pontiac at his home ~~in~~ Bowling Green shortly after 1:00 p.m.

on September 3, 1981. Casey drove to a restaurant where he met Dean Suttle and the two drove north on a Kentucky highway. The agent saw the vehicle nearing the residence of Shirley Basham.

A Kentucky state policeman later that afternoon saw William Hargraves and Dennis Joe Stobaugh arrive at the Casey residence. At about 6:30 p.m., Leonard Casey loaded what appeared to be a cardboard box from his pickup truck into his brown and cream 1978 Chevrolet van bearing the Kentucky license plate number EXY116. At about 7:30 p.m., the van left Johnson Acres Trailer Park where Casey lived on Kentucky Highway 68 and went to Dean Suttle's residence. The van then headed south with Leonard Ray Casey driving, William Hargraves in the front passenger seat, Joe Stobaugh in a rear seat,

and an unidentified passenger in the other rear seat. The fourth person developed to be Suttle. The officers then watched the van proceed nonstop to Gallatin, Tennessee.

Mr. Casey was seen driving the van in a shopping area south of Gallatin with Hargraves in the passenger seat. The van proceeded to drive slowly through the streets of Gallatin, into shopping centers, through parking lots, into the hospital area, through service stations and through McDonald's restaurant.

The van proceeded to Steam Plant Road where it stopped at about 9:30 p.m. Leonard Casey and Joe Stobaugh quickly got out and ran up a nearby railroad track toward the Shrum Vending Company. The men stooped over low as they ran. The van then continued on toward Shrum Vending Company.

At about 11:00 to 11:15 p.m., Harold Dean Suttle was arrested while sitting on the floor of the van in the Donnelley Printing Company parking lot, about 400 yards from the Shrum Vending Company. Suttle was seated by a window that faced toward Shrum. He made a move as if to get around to the front seat. A fully loaded .38 caliber handgun was lying in the driver's seat of the van. A pocketknife was in Suttle's pocket. There was a twoway radio in the front seat as well as a pair of binoculars.

At about 11:30 p.m., two persons ran quickly out of the Shrum Vending Company, according to one witness. Another witness testified that they came out of the nearby R.C. Cola Bottling Company building. A Gallatin police officer shouted, "Halt, police." The two kept

coming toward the police. The police opened fire and both of these persons fell to the ground. Joe Stobaugh, unhurt, was apprehended on the ground while the other person, apparently shot, fled on foot. A police officer thought that this person escaping had some type of weapon. He was later shown to be Casey.

Stobaugh had on a ski mask and a walkietalkie was lying by his side. Some stickers and brush were on the mask. Also nearby was a fully loaded .38 caliber pistol. Stobaugh had a lock pick and a ring of lock pick gun keys on his person. An EZ pick gun for picking locks, another lock pick, a bag of change with three rings of keys in it, and a flashlight were all found within a few feet of Stobaugh.

An acetylene cutting torch that had been in the R.C. building before this incident was found in front of the Armitage Chemical Company. A pair of goggles, vice grips and a hatchet were found in this area. The suspect on foot had fled in this direction. East of the chemical company, behind Andrews Wire Company, a gun belt and holster were found. The belt had places on it for carrying other instruments. A pair of Isotoner gloves was found close to the gun belt.

The co-owner of the Shrum Company testified that he picked up a ring of his keys and some change where it looked like they had been thrown down in front of the Armitage Chemical Company. The police had his sack of change and keys to the lock boxes on the vending machines he operated.

The door of the Shrum Vending Company was found open and it appeared that the lock had been pried. One officer testified that the office area appeared to have been ransacked. It looked as if someone had gone through the papers, desk drawers and file cabinets. These things were open and papers and other things were scattered about. The office couch was pulled out from the wall and the cushions had been thrown in the floor. The shelves inside the trucks in the warehouse had been scattered. There were also glove marks in the office.

In the R.C. Cola Bottling Company building next door, the desk drawers were open. Filing cabinets were also pulled out and articles were scattered.

In the meantime, the F.B.I. had recorded a telephone conversation that

night at 9:45 p.m. between Janie Suttle (Dean's wife) and Shirley Basham in Bowling Green. Janie asked Basham if everything had gone okay. Basham replied, "Yes." He asked Janie to call him if she heard anything from them. Basham said that "if they have the....fella' watching...we, we have no way of knowing." Basham had "told him what to do there," though. Janie stated that "he" would not tell her what Basham had said. Basham stated that if Jabe (Dean Suttle) were to have to get out on foot down there or anything that he would probably call him or Janie. Basham knew about where Jabe would be.

At 3:59 a.m. on September 4, 1981, Leonard Casey told Shirley Basham over the telephone that he had been shot with a shotgun. He asked Basham if he

had heard from anyone else and Basham had not. Casey figured that they must still be down there trying to find somebody. Basham asked if Jabe (Dean Suttle) had gotten away, and Casey said he should have, although Joe "may be bad." Casey explained that they had "slipped in the back on us," and that he lost his piece.

At 4:00 a.m., Basham asked Janie Suttle if she had heard from Jabe. Basham said that they had shot Leonard and the other boy. He said "this is where experience comes in. They're supposed to get the hell away from there. They can'd do nothing for a shot man." Basham told Janie at 4:09 a.m. that "it looks awful bad right now, young'un. Least two of 'em are shot. I don't know where my third man is, and I don't know where Jabe is." At 4:30 a.m. he told

her, "He's either supposed to be still right there, and him laying in the back 'sleep, at the hospital parking lot." The tools and stuff were supposed to have been with them, and they got rid of them. Basham did not know if they explained to him to throw the radio and everything away. Basham was heard on another tape to say that they said two came out firing.

At 5:40 a.m., September 4, 1981, Leonard Casey was arrested near his home in Bowling Green. It appeared that he had been shot and he was treated for a gunshot wound. He was dirty and had sticktights in his hair. A woman had reported that she found a fresh blood type looking substance inside her Chevrolet van on the seats, ignition and dashboard at the Donnelley Printing Company after working there that night.

It was also on a potato chip-like bag. She thought that maybe someone had tried to start her van because the ignition was loose. Also, James Elmore testified his truck was missing from Donnelley that night.

At 9:11 p.m. on September 4, 1981, Basham told a lawyer that he had gotten a boy in jail in Gallatin in trouble. The boy had taken a run for him. The boy had never even told them his name, though. He had done what he was supposed to do so Basham was going to do the same.

At 6:01 p.m. on September 6, 1981, Basham told Dean Suttle that he was sitting up there and no crime had been committed when he was arrested. Suttle said that the only way he could get out of it would be if they believed that he

just crawled up in the van and went to sleep.

At 9:34 p.m. on September 7, 1981, Joe Stobaugh told Basham that he had not ever had anything snatched out of his hand as hard as that change bag was. He was jerked off his feet. After 30 to 45 minutes, they ran a cruiser down in there with lights on him. Stobaugh said that someone pulled out a potato chip bag covered with blood.

The evidence showed separate burglaries.

Although Suttle was arrested a short time before Stobaugh and Casey came from one of the burglarized buildings, it is apparent that Suttle was acting as a lookout while the burglaries were in progress.

None of the defendants testified.

The foregoing evidence was sufficient for any rational trier of fact to find all the defendants except Shirley Ray Basham guilty beyond a reasonable doubt. See T.R.A.P. 13(e) and Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Basham contends that the court erred in failing to dismiss the indictment against him, and that the evidence fails to support the charges of the indictment under which he was tried.

The indictment charged:

"MINUTES CRIMINAL COURT, SUMNER COUNTY, TENNESSEE - OCTOBER 16, 1981
MINUTES BOOK 24 PAGE 72

THIRD COUNT:

And the Grand Jurors aforesaid, on their oath aforesaid, do further present and say that the said SHIRLEY R. BASHAM, heretofore on or about the

> 3rd day of September, 1981, in the County and State aforesaid, did unlawfully, knowingly and feloniously move, incite, counsel and procure Dennis Joe Stobaugh, Harold Dean Suttle, Leonard Ray Casey and Billy Hargraves to commit the felony of burglary in violation of Title 39, Section 903, Tennessee Code Annotated, against the peace and dignity of the State of Tennessee."

Basham filed a lengthy bill of particulars in 61 sections which we think that the court properly denied. A bill of particulars is not for the purpose of broad discovery. State v. Hicks, 666 S.W.2d 54 (Tenn. 1984); State v. Wiseman, 643 S.W.2d 354 (Tenn.Cr.App. 1982). We think that the indictment charges that, in Sumner County, Tennessee, Basham moved, incited, counseled and procured his four codefendants to commit burglary in the third degree while possessing firearms, and that the motion to dismiss it was properly denied.

Basham contends, however, that the evidence under that indictment does not show that he committed any crime in the State of Tennessee. As before mentioned, the indictment charged that he committed the offense in Sumner County, Tennessee. The only evidence showing that Basham had been to Tennessee is found in a tape of his conversation with Stobaugh on September 2, 1981, the day before the burglaries. In it Basham said that he and "the other boys" had been down to look at something in Tennessee; that they went right to it from Stobaugh's instructions. This tape does not show that Basham, in Tennessee, moved or incited anyone to commit these burglaries. The evidence does not show that Basham incited anyone to commit a crime while he was in Tennessee.

Basham was not shown guilty under the indictment in this case, and this issue on the sufficiency of the evidence must be sustained.

Basham also contends that the trial court's instructions amounted to an amendment to the indictment and that this amounted to a material variance.

The trial court instructed the jury:

> "In order to convict the defendant Basham of the offense of Accessory Before the Fact of Third Degree Burglary, you must find beyond a reasonable doubt and to a moral certainty that:
>
> (1) The crime of Third Degree Burglary was in fact committed,
>
> (2) The defendant, Shirley Ray Basham, was not present at the time the said felony was committed,

(3) The principal offenders, Dennis Joe Stobaugh, Harold Dean Suttle, Leonard Ray Casey, and Billy Hargraves, or either of them, actually committed the offense of Third Degree Burglary in such a manner that would make them guilty under the law of this state heretofore read to you, and

(4) The defendant Basham did, on or about the 3rd day of September, 1981, feloniously move, incite, counsel, hire, command, or procure Dennis Joe Stobaugh, Harold Dean Suttle, Leonard Ray Casey, and Billy Hargraves, or either of them, to commit the offense of Third Degree Burglary."

He complains of the addition of "or either of them."

T.C.A. 39-1-301 defines an accessory before the fact: "Any person who shall feloniously move, incite, counsel,

hire, command, or procure any other person to commit a felon..." (emphasis added)

Any variance here is harmless error. See State v. Moss, 662 S.W.2d 590 (Tenn. 1984).

Defendants Stobaugh and Casey were represented by the same attorney at trial. Another lawyer was placed on standby for Casey should any conflict between the two defendants arise. This lawyer made a motion for continuance for Casey before the reading of the indictment, apparently because he was unprepared. This was denied. Casey still had his previous counsel and no conflict had arisen then that would call for the standby counsel. There were no grounds for a continuance at that time. The standby counsel was able to present any

conflicts. The motion for severance Casey claims he made after opening argument came too late and was waived. Tenn.R.Crim.P. 12(b)(5) and 14(a).

Several of the defendants complain that the jury was allowed to read transcripts of the typed conversations while they were being played. They did not object to this when the transcripts were given to the jury and the defendants point to no place in the record where they ever objected to this. They have therefore waived this issue under T.R.A.P. 36(a) and Rule 10(b) of this court.

The defendants assert that the trial court should have charged the jury on other crimes evidence. There was no evidence introduced about other crimes of the defendants, however, and, thus,

there was no need or requirement for the trial judge to charge the applicable law to such facts. Scalf v. State, 565, S.W.2d 506 (Tenn.Cr.App. 1978). Also, the defendants cite no authority to support their argument and have therefore waived this issue. Rules of the Court of Criminal Appeals, 10(b).

The defendants also say that the trial court should have declared a mistrial after several statements by witnesses. One officer stated that he had information "they were dangerous." There was no contemporaneous objection to this statement, though, and the defendants have waived review of it. State v. Sutton, 562 S.W.2d 820 (Tenn. 1978). The trial court also corrected the witness. Likewise, a comment referring to

the Kentucky State Police, organized crime division, was not objected to at the time and review of it has been waived. A defendant did object to another reference to the crime division and his motion for mistrial was overruled. Various crime agencies, such as the F.B.I., were mentioned throughout the trial. It was obvious through the detailed descriptions of surveillance that the authorities suspected the defendants of wrongdoing. We do not believe that the reference to the organized crime division, if error, more probably than not affected the judgment. T.R.A.P. 36(b).

A witness also testified: "I was given four names. We were advised that they were dangerous, they were armed, and at least two of them had made statements that they wouldn't be taken

alive." A defendant's objection was sustained but his motion for mistrial was overruled. The trial court admonished the jury to completely disregard the statement. We believe that any error was corrected by the timely instructions. Armstrong v. State, 555 S.W. 2d 870, 874 (Tenn.Cr. App. 1977).

This issue is overruled.

The defendants further assert that several types of evidence, including sticktights and photographs, should not have been admitted. They have waived this issue by failing to cite any authority. Rules of the Court of Criminal Appeals, 10(b). If error, this was harmless.

Defendant Suttle complains that he should have received a probation hear-

ing. We do not think that he was eligible for probation under T.C.A. 40-21-101. He was convicted of two offenses of third degree burglarly with a firearm in his possession, the maximum offense of each, under T.C.A. 39-3-404, being more than ten years. This issue is overruled.

The defendants assert that they should have been provided certain alleged previous statements of certain witnesses following their direct examinations under Tenn.R.Crim. P. 26.2. The statement of T.B.I. agent James Taylor was not signed by him under Tenn.R.Crim.P. 26.2(g)(1). We have seen no evidence that it was "otherwise adopted or approved by him." The defendants claim it was but point to no page in the record as required by Rule 10(b) of this court. We also do not find

any evidence that this was a "substantially verbatim recital of an oral statement made by the witness under Rule 26.2(g)(2), Tenn.R.Crim.P. Thus, Agent Taylor made no statement for the defendants to examine.

The document attributed to Mr. Lame fits into the same category as the above. It is not a statement under Rule 26.2. Neither is a report with Bobby Bridgewater's name on it.

Bridgewater also made some notes in preparation for trial. We do not see how the denial of these notes more probably than not affected the judgment. T.R.A.P. 36(b). We cannot review the alleged Scruggs and Brewer statements because they are not in the record. Wiley v. State, 552 S.W.2d 410 (Tenn.Cr.App. 1977). This issue is overruled.

The defendants argue that the court erred by conducting the trial as if the defendants were solely charged wih conspiracy to commit an offense. In this issue they say that the wiretap evidence recordings were improperly admitted when no conspiracy was charged or proven and the defendants did not testify. They complain of hearsay evidence and evidence in violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

After considering the entire record, we conclude that the trial court properly allowed the questioned evidence to be considered by the jury.

If a conspiracy is shown to exist, the coconspirator exception to the hearsay rule is applicable even though no conspiracy has been formally charged.

State v. Lequire, 634 S.W.2d 608 (Tenn.Cr.App. 1981), footnote 1.

The evidence in this record shows that an ongoing conspiracy existed between these five codefendants, along with an unindicted coconspirator, Janie Suttle, to commit these crimes. In view of this fact, the coconspirator exception to the hearsay rule is applicable here.

In Lequire v. State, supra, this court said:

> "A conspiracy is defined as a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means. Owens v. State, 178 Tenn. 32, 154 S.W.2d 529 (1941). Everyone entering into a conspiracy is a party to every act which has before been done by the others, and to every act by the others afterward, in furtherance of the common design. The act of one is considered the act of all and, therefore, is imputable to all. Solomon v. State, 168 Tenn. 180, 76 S.W.2d 331 (1934).

> Also, where one coconspirator commits the target crime in the absence of the other, the absent one is equally guilty as a principal. Beck v. State, 203 Tenn. 671, 315 S.W.2d 254 (1958); Pierce v. State, 130 Tenn. 24, 168 S.W. 851 (1914). Once a conspiracy has been established, evidence of any act or declaration of a conspirator during the conspiracy, and in furtherance of it, is coconspirator on trial for the commission of the target crime. Randolph v. State, 570 S.W.2d 869 (Tenn.Cr.App. 1978); Evans v. State, 557 S.W.2d 927 (Tenn.Cr.App. 1977); 3 Wharton's Criminal Evidence § 642 (13th ed. 1973)."

On the tapes, each defendant showed his knowledge about the burglary. Their interlocking statements showed that each defendant was involved as to the crucial facts such as time, location, felonious activity, and the awareness of an overall plan. Also, there is no Bruton problem in the present case. Bruton does not prohibit the use as evidence of

a coconspirator's statements against another coconspirator. Lequire v. State, supra.

The defendants say that the court permitted some wiretap evidence after the conspiracy had terminated. We find that the conspiracy was still in existence when this evidence was admitted. A conspiracy may continue after the crime has been committed for, among other things, the concealment of the crime. 22(A) C.J.S. Criminal Law § 770.

We find no error in the trial court's instructions on conspiracy. We likewise find without merit Basham's claim that the trial court should have granted him a severance at the close of the state's proof.

The state was able to make out a case against the defendants here in

large part because of surveillance. The defendants now challenge the legality of the information obtained through the electronic surveillance used in the investigation against them.

They first assert that the wiretap application was not properly authorized. The record reveals, though, that the assistant United States attorney, properly designated by the Attorney General of the United States, properly authorized under 18 U.S.C. 2516(1) this application for interception of wire or oral communications to the federal district court in Kentucky.

18 U.S.C. 2516(1) provides that any assistant attorney general specially designated by the attorney general may authorize an application for a wiretap. Attorney General Benjamin R. Civiletti

designated the Assistant Attorney General in charge of the criminal division, D. Lowell Jensen, to authorize applications for a wiretap. Jensen did authorize any law enforcement officer of the United States to make a wiretap application in the Basham case. United States Attorney Alexander Taft, Jr., a law enforcement officer of the United States, made the application. It was granted by the Kentucky federal court.

It is true that Jensen's signature dos not appear on the authorization. There is no requirement that it should under 18 U.S.C. 2516(1), however, and indeed, there is no requirement that the authorization itself be in writing. The federal court and the trial court below were satisfied that Jensen authorized this wiretap and there was sufficient evidence to support that finding.

Jensen granted the authorization upon the recommendation of Philip Wilens, director of the office of enforcement operations of the criminal division of the Attorney General's office. Jensen still authorized the wiretap properly. Also, we see no problem with the fact that Wilens apparently prepared the authorization letter from Jensen to Taft.

The defendants also contend that the application contained information from a pen register that was not authorized by the court. In Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), the Supreme Court condoned the use of pen register evidence obtained without court authorization. This was because the defendant had no reasonable expectation that the phone

numbers he dialed would remain private. Id, at 442 U.S. 743. Thus, the Fourth Amendment does not extend to pen registers, and any information from an unauthorized pen register was properly considered by the federal judge. It follows that the defendants' argument that probable cause was required for the authorization of the other pen registers obtained by court order is likewise without merit.

The defendants assert that the district judge did not read the application for the wiretap, and that the application contained no probable cause to issue the wiretap order. There is no evidence in the record that the judge did not read this application. After examination of the application, we find that there was probable cause under 18 U.S.C.

2518(3) to issue the order. Defendants' assertion that normal investigation procedures were not utilized before resorting to the writings is meritless.

The affidavit showed that an F.B.I. agent tried to penetrate Basham's fencing operation but failed because Basham would only deal with people he or an acquaintance knew. F.B.I. agents, Bureau of Alcohol, Tobacco and Firearms agents and the Kentucky State Police conducted surveillance of Basham and Leonard Casey. Surveillance of Basham ended when apparently his attorney asked the Kentucky State Police to stop it. Casey used circuitous routes, and a plane had to be used to help observe him, which Casey apparently knew. Confidential sources stated that they would not furnish information about Basham for fear

of their lives and the lives of their families. Several pen registers were also used.

The authorities here make a concentrated effort to gain information about Basham's operation without resorting to a wiretap. These efforts did not or could not accomplish this. The authorities are not obligated to exhaust every investigative technique in the book before obtaining a wiretap order. United States. V. Martin, 599 F.2d 880 (9th Cir.), cert. denied. 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979). We believe that here they did show under 18 U.S.C. 2518(3)(c) that normal investigative procedures had been tried and had failed or reasonably appeared to have been unlikely to succeed if tried or to have been too dangerous.

The defendants also challenge the reliability of the informants. Informant CS-1 provided valuable information about Basham's vast history in dealing in stolen goods, his associates and about how he conducted this business almost exclusively through his telephones at his residence. CS-1 furnished information in 1981 which resulted in several convictions in Kentucky, and in the recovery of a large quantity of stolen property. Other similarly reliable informants, according to other law enforcement officials known to the affiant, also provided valuable information in this application. Clearly, the informant information was reliable and could be considered in the determination of probable cause.

The defendant Basham filed a motion below, which was overruled, to

produce two of the informants in this case so that their reliability could be tested in court. He believed that the statements attributed to them in F.B.I. Agent Brewer's affidavit in the wiretap application were false and that Agent Brewer had no way of knowing if they were true. Agent Brewer had not had personal contact with these informants. Defendant asserted that Brewer only used this information to deceive the court.

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court held that a defendant may, in some cases, challenge the validity of an affidavit that shows probable cause for a search warrant. The defendant must assert that the affiant has stated deliberate falsehoods in the affidavit or displayed a reckless disre-

gard for the truth. The defendant's attack must be more than conclusory and must contain an offer of proof. If the defendant makes a substantial preliminary showing of such falsehood, then his request for a hearing must be granted. In that hearing, the defendant will have an opportunity to prove the deliberate falsity or reckless disregard of the affiant.

In this hearing, the impeachment of nongovernmental informants is not allowed. The attack must be on the affiant and must show that he had reason to believe that the information was false. Thus, the trial court properly denied the defendant's request to produce the informants to test their reliability. The defendant was allowed to test the affiant at the motion to suppress hearing,

but no misconduct by him was revealed. He only testified that he had not had personal contact with these informants, but had been told that they were reliable. No evidence was introduced that the affiant had reason to believe the information was false. Therefore, the trial court correctly concluded that the affiant had no reason to believe the information false. This issue is overruled.

The defendants further contend that the wiretap evidence was obtained through ruse and collusion of the F.B.I. and the Kentucky State Police in violation of Kentucky statutes prohibiting wiretap evidence.

The wiretap was properly authorized under federal law. The F.B.I. was assigned to collect information from

the wiretap and they did. We find no ruse or collusion between the F.B.I. and the Kentucky State Police to taint the procedure in this case.

We note that in Basham v. Commonwealth, Ky., 675 S.W.2d 376 (1984), the Supreme Court of Kentucky considered a similar claim by Basham involving the same wiretap now before us and authorized by the federal judge on August 14, 1981. The Kentucky court addressed the issue of collusion to avoid the state law and also found none. It held that evidence obtained in a federal wiretap that complied with federal constitutional and statutory requirements could be used against Basham and the other defendants in state court proceedings, even though a Kentucky statute prohibits electronic eavesdropping.

The defendants further assert that the United States Attorney did not comply with the wiretap order that called for him to submit progress reports to the court every five days. They contend that the first written report was not submitted until almost two months after the wiretap order. However, the U.S. Attorney testified that he made oral reports to the court every five days. Nowhere does the wiretap order require written reports. This issue is meritless.

For the previously stated reasons, the conviction of Basham must be reversed and dismissed. We have examined all other issues as to Basham and the other defendants and find them to be without merit. The convictions of Casey, Stobaugh and Suttle are affirmed.

No. 85-188-III
IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED MARCH 16, 1987

STATE OF TENNESSEE,
Appellee
v. SUMNER CRIMINAL

SHIRLEY RAY BASHAM, ET AL,
Appellee/Appellants

ORDER

Upon consideration of the applications for permission to appeal and the entire record in this cause, the Court is of the opinion that the applications filed on behalf of Dennis Joe Stobaugh, Leonard Ray Casey and Harold Dean Suttle should be and the same hereby are denied at the cost of the said appellants, and that the application filed on behalf of the State against Shirley Ray Basham is granted.

PER CURIAM

No. 2193
IN THE CRIMINAL COURT FOR SUMNER COUNTY, TENNESSEE
AT GALLATIN

OCTOBER 1984

STATE OF TENNESSEE

v.

SHIRLEY BASHAM, ET AL

ORDER

Decided and Filed October 16, 1984

Before: FRED A. KELLY, III,
Criminal Court Judge

The Motion to Suppress information received by way of wiretap, Motion to produce the names of the informants, Motion to Dismiss and Motion for Bill of Particulars filed by the Defendants came on to be heard on October 9, 1984, before the Honorable Fred A. Kelly, III, Criminal Court Judge, and upon a thorough reading of the transcript of proceedings

previously heard in this Court on December 6, 1982, and examination of the entire record to the date of hearing this matter, including all previous Orders, all summaries of information received from wiretaps, the excellent and comprehensive Briefs of the parties, arguments of counsel and written summary furnished on behalf of Defendants, it is the consideration and finding of this Court that the Motions are not well taken, therefore,

It is hereby Ordered and Decreed that all of such Motions be and are hereby overruled, and

Be it further Ordered that the Motion of the District Attorney made during the hearing on these Motions that testimony of witnesses which would disclose the names of informants and testi-

mony concerning the truthfulness of the information be excluded is hereby sustained as the proof is adequate that the officers in this case had probable cause to rely upon such information and to believe the informants to be reliable and to act thereupon.

This 16th day of October, 1984.

FRED A. KELLY, III
CRIMINAL COURT JUDGE

No. 81-814-01-L
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS TO AND FROM TELEPHONES BEARING THE NUMBERS: (502)781-1091, (502)781-5637, BOTH LOCATED AT BOWLING GREEN, KENTUCKY, WITHIN THE WESTERN DISTRICT OF KENTUCKY

ORDER
AUTHORIZING INTERCEPTION OF
WIRE COMMUNICATION

Before: THOMAS A. BALLANTINE, JR., Judge, United States District Court

Filed: August 14, 1981

Application under oath having been made before me by Alexander T. Taft, Jr., United States Attorney, an "investigative or law enforcement officer" as defined in Section 2510 of Title 18, United States Code, for an order authorizing the

interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to matters set forth therein, the Court finds:

A) there is probable cause to believe that Shirley Ray Basham, Billy Ray Buchanan, Leonard Ray Casey, William Albert Hudson, Sr., George Myrland Allen, William Dean Byrns, Fred Tabor, Donald Bradley, John Lowery, William Ralph Hargraves, and others as yet unknown have committed and are committing offenses involving violations of Title 18, United States Code, Section 2314, (Interstate Transportation of Stolen Property), Section 2315, (Interstate Receipt of Stolen Property), Section 659, (Theft from Interstate Shipments), Conspiracy to Commit the above-mentioned offenses, in viola-

tion of Title 18, United States Code, Section 371, and Narcotic and Trafficking offenses in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

B) there is probable cause to believe that particular wire communications of Shirley Ray Basham, Billy Ray Buchanan, Leonard Ray Casey, William Albert Hudson, Sr., George Myrland Allen, William Dean Byrns, Fred Tabor, Donald Bradley, John Lowery, William Ralph Hargraves, and others as yet unknown concerning these will be obtained through interception, authorization for which is herewith applied. These communications will concern theft from interstate shipments, the interstate transportation and receipt of the stolen property, illegal distribution of controlled substances, a conspiracy to commit these offenses,

the identity of the participants and the precise nature and scope of the illegal activity.

C) there is probable cause to believe that telephone number (502)781-1091, subscribed to in the name of Shirley Ray Basham, and telephone number (502) 781-5637, subscribed to by Alice Basham, both located at Route 10, Box 54, Campbell Road, Bowling Green, Kentucky, and both billed to Shirley Ray Basham, at the address listed above have been used, are being used and will be used by Shirley Ray Basham, Billy Ray Buchanan, Leonard Ray Casey, William Albert Hudson, Sr., George Myrland Allen, William Dean Byrns, Fred Tabor, Donald Bradley, John Lowery, William Ralph Hargraves, and others as yet unknown in connection with the commission of the offenses detailed herein.

D) normal investigative procedures have been tried unsuccessfully and reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried.

WHEREFORE, IT IS HEREBY ORDERED that Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized pursuant to application authorized by the Assistant Attorney General in Charge of the Criminal Division of the United States Department of Justice, who has been specifically designated by the Attorney General of the United States to exercise the power conferred to him by Section 2516 of Title 18, United States Code, to:

1) Intercept wire communications of Shirley Ray Basham, Billy Ray Buchanan, Leonard Ray Casey, William

Albert Hudson, Sr., George Myrland Allen, William Dean Byrns, Fred Tabor, Donald Bradley, John Lowery, William Ralph Hargraves, and others as yet unknown, concerning the above listed offenses to and from telephone number (502)781-1091, subscribed to by Shirley Ray Basham, and located at Route 10, Box 54, Campbell Road, Bowling Green, Kentucky, and to and from telephone number (502)781-5637, subscribed to by Alice Basham, and located at Route 10, Box 54, Campbell Road, Bowling Green, Kentucky.

PROVIDING FURTHER, that such interceptions authorized in paragraphs A,B and C of this order shall not automatically terminate when the type of communication detailing offenses described above has first been obtained but shall continue until communications are inter-

cepted which reveal the manner in which Shirley Ray Basham, Billy Ray Buchanan, Leonard Ray Casey, William Albert Hudson, Sr., George Myrland Allen, William Dean Byrns, Fred Tabor, Donald Bradley, John Lowery, William Ralph Hargraves, and others as yet unknown, participate in the above-described offenses and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein, or for the period of thirty (30) days from the date of this order, whichever is earlier.

It is further ordered upon request of the applicant that the South Central Bell Telephone Company, Louisville, Kentucky, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code,

shall continue to furnish the Federal Bureau of Investigation forthwith with all information, facilities, and technical assistance necessary to accomplish the interceptions unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted; the furnishing of such facilities or technical assistance by South Central Bell Telephone Company, Louisville, Kentucky, is to be compensated for by the applicant at the prevailing rates. To avoid prejudice to this criminal investigation, the said communication common carrier, its agents, and employees are hereby ordered not to disclose or cause the disclosure of his order or the interceptions which it authorizes to any person other than those of its agents and

employees who require said information to accomplish the interceptions of communications hereby ordered. In particular, said carrier, its agents, and employees shall in no event make such disclosure to a telephone subscriber, any potential interceptee or participant in the offenses named in this order. Moreover, this order shall be sealed.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of thirty (30) days from the date of this order.

PROVIDING ALSO, that the supervising United States Attorney shall provide the Court with a report, every five (5) days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

THOMAS A. BALLENTINE, JR.
JUDGE, UNITED STATES
DISTRICT COURT

DATE: 8/14/81

TIME: 12:00 Noon

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS TO AND FROM TELEPHONES BEARING THE NUMBERS: (502)781-1091, (502)781-5637, ALL LOCATED AT BOWLING GREEN, KENTUCKY

AFFIDAVIT

OF: ROBERT H. BREWER,
Special Agent,
Federal Bureau of Investigation
Department of Justice

BEFORE: THOMAS A. BALLANTINE, JR.
United States District Judge
Western District of Kentucky

FILED: August 14, 1981

Robert H. Brewer, Special Agent of the Federal Bureau of Investigation, Bowling Green, Kentucky, being duly sworn, states:

1. I am an "investigative or law enforcement officer of the United

States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, an officer of the United States who is empowered by law to conduct investigations of, or make arrests for, offenses enumerated in Section 2516, Title 18, United States Code.

2. This affidavit seeks authorization to intercept wire communications concerning offenses involving violations of Title 18, United States Code, Section 2314, (Interstate Transportation of Stolen Property), Section 2315, (Interstate Receipt of Stolen Property), Section 659, (Theft From Interstate Shipments), and Conspiracy to commit the above-mentioned offenses, in violation of Title 18, United States Code, Section 371, and Narcotic and Trafficking offenses in violation of Title 21, United

States Code, Sections 841(a)(1) and 846, which have been and are now being committed by Shirley Ray Basham, William Albert Hudson, Sr., George Myrland Allen, William Dean Byrns, Leonard Ray Casey, Billy Ray Buchanan, Fred Tabor, Donald Bradley, John Lowery, William Ralph Hargraves, and others yet unknown.....

(Above is Page 1 of Affidavit)

.....above and others yet unknown participate in the use of telephone facilities for commission of the various offenses detailed above but that the court shall allow the interception to continue until these interceptions reveal the identities of confederates of the above-named persons, location of operation of the conspiracy or conspiracies or for a period of thirty days from date of the Court's Order, whichever is shorter.

Should the court grant the Order requested herein, monitoring of the wire communications at the locations above and on the telephone numbers specified shall immediately terminate when it is determined through voice identification or surveillance that none of the principals are participating in the conversation or the conversation is not criminal in nature.

Louisville, Kentucky, this 14th day of August.

Robert H. Brewer
ROBERT H. BREWER, Special Agent, Federal Bureau of Investigation, Department of Justice

Subscribed and sworn to before me this 14 day of August, 1981.

Thomas A. Ballantine, Jr.
United States District Judge
Western District of Kentucky

(Above is Page 67 of Affidavit)

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

SPECIAL DESIGNATION OF ASSISTANT ATTORNEYS GENERAL TO AUTHORIZE APPLICATIONS FOR COURT ORDERS AND TO APPROVE EMERGENCY INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS UNDER CHAPTER 119, TITLE 18, UNITED STATES CODE.

ORDER NO. 931-81

FROM: BENJAMIN R. CIVILETTI,
Attorney General

DATE: January 19, 1981

By virtue of the authority vested in me by 28 U.S.C. 509, 510, 5 U.S.C. 301, and 18 U.S.C. 2516, 2518(7), I hereby specially designate the Assistant Attorney General in charge of the Criminal Division, the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Office of Legal Counsel, and the

Assistant Attorney General in charge of the Antitrust Division (1) to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility to the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code, and (2) when I am not in the District of Columbia or am otherwise not available to exercise the power conferred by Section 2510(7) of Title 18, United States Code, to approve an emergency interception of wire or oral com-

munications in accordance with the statutory requirements. Provided, that the Assistant Attorney General in charge of the Tax Division is authorized to exercise the power herein conferred only when the Assistant Attorney General in charge of the Criminal Division is not in the District of Columbia or is otherwise not available. Provided further, that the Assistant Attorney General in charge of the Office of Legal Counsel is authorized to exercise the power conferred only when both the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Tax Division are not in the District of Columbia or are otherwise not available. Provided further, that the Assistant Attorney General in charge of the Antitrust Division is authorized to exer-

cise the power herein conferred only when the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Office of Legal Counsel are not in the District of Columbia or are otherwise not available.

Order No. 799-78 of August 15, 1978 is revoked.

Date: 1/19/81

Benjamin R. Civiletti
BENJAMIN R. CIVILETTI
Attorney General

Subject: Authorization for Interception Order Application/[1]

Filed: August 13, 1981

To: Philip Wilens, Director
Office of Enforcement
Operations, Criminal
Division

From: D. Lowell Jensen
Assistant Attorney General
Criminal Division

This is with regard to your recommendation that I, the Assistant Attorney General in charge of the Criminal Division, authorize an application to a Federal judge of competent jurisdiction for an order under Title 18, United States Code, Section 2518, authorizing the interception of wire communications for a thirty (30) day period to and from the telephones bearing the numbers 502-781-1091 and 502-781-5637, both of

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/[1] Document bears no signature or initials.

which are located at Route 10, Box 54, Campbell Road, Bowling Green, Kentucky, in connection with an investigation into possible violations of Title 18, United States Code, Sections 371, 659, 2314 and 2315, and Title 21, United States Code, Sections 841 and 846 by Shirley R. Basham, William A. Hudson, George M. Allen, William D. Byrns, Leonard R. Casey, Billy R. Buchanan, Fred Tabor, Donald Bradley, John Lowery, William R. Hargraves, and others as yet unknown.

By virtue of the authority vested in him by Section 2516 of Title 18, United States Code, the Attorney General of the United States has by Order Number 931-81, dated January 19, 1981, specially designated the Assistant Attorney General in charge of the Criminal Division to authorize applications for

court orders authorizing the interception of wire or oral communications. As the duly appointed Assistant Attorney General in charge of the Criminal Division, this power is exercisable by me. WHEREFORE, acting under this delegated power, I hereby authorize the above-described application to be made by any investigative or law enforcement officer of the United States as defined in Section 2510(7) of Title 18, United States Code.

Dated: August 14, 1981

Honorable Alexander T. Taft, Jr.
United States Attorney
Room 211, U.S.P.O. & Courthouse
601 West Broadway
Louisville, Kentucky 40202

Dear Mr. Taft:

This is to advise that pursuant to the power delegated to him by special designation by the Attorney General under the authority vested in him by Section 2516 of Title 18, United States Code, the Assistant Attorney General of the Criminal Division has authorized an application to be made to a federal judge of competent jurisdiction for an order under Section 2518 of Title 18, United States Code, authorizing the interception of wire communications for a thirty (30) day period to and from the telephones bearing the numbers 502-781-1091 and

502-781-5637, both of which are located at Route 10, Box 54, Campbell Road, Bowling Green, Kentucky, in connection with an investigation into possible violations of Title 18, United States Code, Sections 371, 659, 2314 and 2315, and Title 21, United States Code, Sections 841 and 846 by Shirley R. Basham, William A. Hudson, George M. Allen, William D. Byrns, Leonard R. Casey, Billy R. Buchanan, Fred Tabor, Donald Bradley, John Lowery, William R. Hargraves, and others as yet unknown. A copy of the Attorney General's order specially designating the Assistant Attorney General in charge of the Criminal Division to authorize applications for interception orders of this nature and a copy of the Assistant Attorney General's memorandum of authorization are attached hereto.

Accordingly, you or any other attorney on your staff who is an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, are authorized to make the above-described application.

Very truly yours,

D. Lowell Jensen/[1]
Assistant Attorney General
Criminal Division

By: Philip Wilens

Philip Wilens, Director
Office of Enforcement
Operations
Criminal Division

Enclosures

/[1] Not signed or initialed by Jensen

NO. 2193
IN THE CRIMINAL COURT FOR
SUMNER COUNTY, TENNESSEE
AT GALLATIN

STATE OF TENNESSEE

v.

SHIRLEY BASHAM

MOTION TO SUPPRESS

FROM: WILLIAM B. VEST,
Counsel for Defendant Basham

FILED: November 9, 1982

Comes the Defendant, SHIRLEY RAY BASHAM, and moves pursuant to T.R.C.P. 12 for the suppression of the contents of any and all interceptions of wire and oral communications, and evidence derived therefrom, to and from telephone numbers 5402-781-1091 and 502-781-5637 listed to Defendant and his wife, Alice Basham, on the ground that said communications were unlawfully in-

tercepted and unlawfully divulged, as hereinafter more specifically appears:

Defendant shows:

1. That the Interception Order shows on its face that the U.S. Attorney for the Western District of Kentucky, Alexander T. Taft, Jr., did not have the requisite authority to make such application in that Taft did not have the lawful authorization from the Attorney General of the United States or any Assistant Attorney General of the United States specifically designated by the Attorney General of the United States, as required by 18 U.S.C.A. 2516(1), and is therefore void.

3. That, by reason of the foregoing circumstances, the Applications presented the Honorable Thomas Ballentine, District Judge, were formally

defective, and no valid orders of interception have ever been entered pursuant to 18 U.S.C. 2518 in the within case; and all evidence procured under such orders as were issued, based upon the applications tendered to the District Judge, has been unlawfully obtained.

WHEREFORE, DEFENDANT BASHAM PRAYS THAT, for all the foregoing reasons, and for each of the stated reasons, the evidence procured by virtue of any wiretap order be suppressed, and that upon such suppression of evidence, the case against Defendant BASHAM be dismissed.

This the 9th day of November, 1982.

William B. Vest
WILLIAM B. VEST
Counsel for Defendant Basham

TESTIMONY OF U.S. ATTORNEY TAFT
CRIMINAL COURT FOR SUMNER COUNTY

December 6, 1982 Trial Transcript
Page 159 and 160

EXAMINATION BY MR. McCALL

Q. Mr. Taft, were you present with the agent when he presented the affidavit to Judge Ballantine for his signature?

A. Yes.

Q. Do you recall where that was done on the 14th of August? Was it done in his chambers?

A. Without referring to my records I wouldn't know exactly. I would assume that was on the 14th, for the purposes of discussion today. It was in his chambers. I can tell you that.

Q. Do you know how long Judge Ballantine took to review the affidavit? Do you recall?

A. I don't. My recollection is that we went to his chambers with the application and the supporting affidavit. I believe it was Agent Brewer and myself. I believe the affidavit was signed in the presence of Judge Ballantine, witnessed personally by him. I was there when it was signed. It wasn't outside his chambers. My recollection is he reviewed not only the application but also the affidavit prior to signing the authorization.

Q. Do you recall if there was anybody else present other than Agent Brewer and yourself? In other words, were there any other affiants there before the Judge?

A. No.

Q. And you can't specifically recall whether he reviewed the affidavit or whether he asked the agent any questions about it or what time period elapsed? That's what I'm trying to get to.

A. I really wouldn't be able to make a guess on the time period. I know he did take time to read through the application and at least look through the affidavit. My recollection is that he did ask some questions, although I couldn't tell you what questions he asked.

TESTIMONY OF U.S. ATTORNEY TAFT
CRIMINAL COURT FOR SUMNER COUNTY

December 6, 1982 Trial Transcript
Page 167

EXAMINATION BY MR. JONES

Q. (By Mr. Jones) This application which you signed and then the order authorizing the interception, was that order prepared by you or under your direction at the time it was carried in to Judge Ballantine?

A. Yes.

TESTIMONY OF U.S. ATTORNEY TAFT
CRIMINAL COURT FOR SUMNER COUNTY

December 6, 1982 Trial Transcript
Page 168

EXAMINATION BY MR. JONES

A. My recollection--I'd have to say he read it. I don't want to mince words with you. I don't know if he's a speed reader or not. I don't know how much he comprehended as he turned the pages. He looked at each and every page. Keeping in mind that you're right that it takes some time to read that, and I have to admit I wasn't standing over his shoulder watching his every move. We simply went to his chambers, presented this, and told him what it was. We presented the application to him and then waited while he reviewed it.

Q. Did Mr. Brewer accompany you there?

A. Yes, because my recollection is he signed it in Judge Ballantine's presence and swore to it in front of Judge Ballantine.

Q. Were there any other agents present at that time?

A. My recollection is it was just Agent Brewer and myself.

Q. Would it be fair to say that either you or Agent Brewer gave him a sort of summary of what was in the affidavit and explained what you wanted?

A. If I understand your question correctly, I would say yes. Agent Dodd of the FBI's Louisville office may have been present. I wouldn't want to be quoted on that.